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IN THE
COURT OF APPEALS OF INDIANA

JASON REYNOLDS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0610-CR-953
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0603-FB-39832

August 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Jason Reynolds appeals his convictions and sentences for robbery, criminal confinement, and possession of a firearm by a serious violent felon. Reynolds raises three issues, which we restate as: (1) whether the trial court abused its discretion in denying Reynolds's motion for a continuance made on the day of his trial; (2) whether his convictions for both robbery and criminal confinement violate the prohibition against double jeopardy; and (3) whether the trial court improperly ordered that his sentences run consecutively. Concluding that the trial court acted within its discretion in denying Reynolds's motion for a continuance, that the convictions for robbery and criminal confinement do not violate double jeopardy, and that the trial court properly ordered the sentences to run consecutively, we affirm.

Facts and Procedural History

On March 2, 2006, Reynolds, wearing a hooded sweatshirt and a ski mask and armed with a .9mm handgun entered a National City Bank in Indianapolis. Four people were in the bank at this time: the office manager, Gustabo Escalante; a teller, Ruthie Willsey; and two customers, Sholanda Johnson and Jeffrey Porter. Reynolds ordered everyone to the ground and told Willsey, who had been on the telephone, to "drop the phone." Transcript at 87. Reynolds then jumped over the counter and told Willsey: "Give me the money. Where's the money." Id. at 88. Willsey opened her drawer, and Reynolds proceeded to empty it and the remaining cash registers. Reynolds then jumped back over the counter and ran out the door.

Escalante and Porter went to the door, which Escalante locked, and watched Reynolds

leave. Porter saw Reynolds get into what he believed to be a Chrysler PT Cruiser,[1] and drive away. As Reynolds was leaving the parking lot, the car door opened, and a dye pack exploded.[2]

Escalante, Willsey, and Johnson could not see Reynolds's face, as he was wearing a mask, but indicated that he had been wearing black Nike shoes, jeans, and a black sweatshirt. When Porter had originally entered the bank, he had seen someone sitting in that vehicle whom he recognized from his work at a nearby gas station convenience store. Porter did not know this man's name, but recognized his face. When he walked past the car, the man had waved to him and Porter had waved back. Porter believed this man to have been the robber. A description of Reynolds and the car he was driving was broadcast, and Reynolds was shortly pulled over. Officers found red dye on Reynolds's jeans and the interior of his vehicle, and discovered a handgun, mask, and gloves in his car. Officers took Porter to the scene of the arrest, and Porter identified Reynolds as the bank robber.

The State ultimately charged Reynolds with robbery, a Class B felony, two counts of criminal confinement, both Class B felonies, and unlawful possession of a firearm by a serious violent felon, a Class B felony.[3]

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[1] Reynolds was actually driving a Chevrolet HHR, which has a body design similar to that of a PT Cruiser.

[2] A dye pack is a device that is made to look like a stack of currency, but actually contains red dye and is programmed to explode when it leaves the bank, thereby rendering the stolen currency worthless and marking the perpetrator.

[3] The State had originally charged Reynolds with three counts of robbery, all Class B felonies, three counts of criminal confinement, all Class B felonies, unlawful possession of a firearm by a serious violent felon, a Class B felony, and carrying a handgun without a license, a Class C felony.

On Friday, September 15, 2006, at the hearing on the State's motion to amend, Reynolds told the trial court: "I need to terminate my lawyer, because I haven't been represented the way that I would like to be represented." Tr. at 6. The trial court informed Reynolds that it does not interfere with contractual relationships,[4] recommended that Reynolds speak with his attorney, and indicated that any motion for a continuance would have to be in writing. On Monday, September 18, 2006, the day of Reynolds's trial, Reynolds also addressed the court on this issue:

> I requested over a month ago to have depositions taken or some evidence suppressed or something, and I haven't had anything. Me and my lawyer really haven't discussed this case. We haven't really discussed trial, how we are going to go about the trial or anything. And so I am kind of, like, in the blind to it.
> And . . . I don't know if maybe me and him need more time together or what's going on. But we haven't really communicated too much, to where I'm kind of, you know, just stuck between a rock and a hard place right now.
> And, I mean, I am not trying to just drag it out and be wasting the Court's time. But in my position, with my life on the line, I would kind of like to be able to, you know, acquire some knowledge of the case, which . . . I haven't done.

Tr. at 21-22. Reynolds's attorney indicated that he had met with Reynolds on several occasions, spoken to the State's witness who would be identifying Reynolds, and was prepared for trial. He also explained that it was not feasible to take depositions of every witness and that the witnesses other than Porter were not identifying Reynolds as the robber.

[4] Reynolds hired his attorney.

The trial court found no reason for further delay,[5] and ordered that Reynolds's trial be held.

At trial, Escalante, Willsey, Johnson, and Porter testified as to what they had witnessed, and Porter positively identified Reynolds as the robber. Evidence that Reynolds was found with red dye on his jeans, and a gun, mask, and gloves in his car was also introduced.

The jury found Reynolds guilty of robbery, one count of criminal confinement, and possession of a firearm by a serious violent felon. At the sentencing hearing, the trial court entered judgments of conviction on all three counts, sentenced Reynolds to fifteen years for both robbery and criminal confinement, ten years for possession of a firearm, and ordered that all sentences run consecutively. Reynolds now appeals.

Discussion and Decision

I. Motion for Continuance

Reynolds does not argue that his motion for continuance was based on a reason identified in Indiana Code section 35-36-7-1; therefore, we review the trial court's decision to deny Reynolds's motion for an abuse of discretion. See Wells v. State, 848 N.E.2d 1133, 1143 (Ind. Ct. App. 2006), corrected on reh'g, 853 N.E.2d 143, trans. denied, cert. denied, 127 S.Ct. 1913 (2007). We will conclude that the trial court abused its discretion only if its decision "is clearly against the logic and effect of the facts and circumstances before the court." Id. We will not conclude that the trial court abused its discretion unless the

[5] Reynolds's trial date had been scheduled on three previous occasions. Once, it was rescheduled due to court congestion. The record is not clear as to the reasons for the other changes in trial dates. Reynolds had apparently changed attorneys on two previous occasions.

defendant can demonstrate prejudice as a result of the trial court's denial of the motion for continuance. Dorton v. State, 419 N.E.2d 1289, 1295 (Ind. 1981).

Reynolds argues that the trial court's denial of his motion deprived him of his right to counsel as guaranteed by the Sixth Amendment. "[A]lthough a defendant may be granted wide latitude in matters related to the selection of counsel, he has no right to utilize it as a vehicle for obtaining a delay to which he is not entitled." Hardin v. State, 275 Ind. 63, 64-65, 414 N.E.2d 570, 71-72 (1981); see also German v. State, 268 Ind. 67, 71, 373 N.E.2d 880, 882 (1978), called into doubt on other grounds, Sherwood v. State, 717 N.E.2d 131, 135 n.2 (Ind. 1999) ("[A] defendant may not through a deliberate process of discharging retained or assigned counsel whenever his case is called for trial disrupt sound judicial administration by such delaying tactics."). Reynolds had previously changed lawyers on two occasions, and his trial had already been postponed three times. He informed the trial court on the Friday before his Monday trial that he was dissatisfied with his counsel, and did not move for a continuance until the day of trial. His counsel told the trial court that he had spoken to Porter, the sole identifying witness, and that taking the depositions of the other witnesses would not be feasible or productive. Although Reynolds argues that his disagreement over whether to depose the remaining witnesses was "an honest disagreement . . . which significantly impacted pre-trial strategy," appellant's brief at 13, he has failed to articulate how he was prejudiced by the failure to depose the remaining witnesses. Indeed, the remaining witnesses merely described what they observed during the robbery, and this information was also available to the jury through surveillance photographs showing Reynolds committing the

robbery. Because Reynolds had considerable time prior to his trial during which he could have elected to change counsel, and because Reynolds's counsel indicated that taking additional depositions would not aid the defense and that he was prepared to go to trial, Reynolds has failed to demonstrate prejudice. See Dickson v. State, 520 N.E.2d 101, 105 (Ind. 1988) (finding no abuse of discretion where there was a considerable length of time before defendant's trial, defendant's counsel was able to interview witnesses, and defendant was unable to demonstrate prejudice); German, 268 Ind. at 71-72, 373 N.E.2d at 882 (holding that trial court properly denied motion for continuance based on defendant's desire to hire new counsel where defendant had been represented by counsel for four months and failed to demonstrate that counsel was ineffective). We conclude that the trial court acted within its discretion in denying Reynolds's motion for a continuance.

II. Double Jeopardy

In Indiana, multiple convictions are prohibited if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999). "Under the Richardson actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). We will analyze both offenses being challenged on double jeopardy grounds in the context of the other offense, and will find "double jeopardy to be violated where the

evidentiary fact(s) establishing one or more elements of one challenged offense establish all of the elements of the second challenged offense." Alexander v. State, 772 N.E.2d 476, 478 (Ind. Ct. App. 2002) (opinion on reh'g), trans. denied. When determining what facts a jury used to establish each element of an offense, "we consider the evidence, charging information, final jury instructions . . . and arguments of counsel." Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

The elements of robbery as a Class B felony are satisfied when a person: (1) knowingly or intentionally; (2) takes property from another person; (3) by using or threatening to use force or putting a person in fear; and (4) is armed with a deadly weapon.[6] Ind. Code § 35-42-5-1. The elements of criminal confinement as a Class B felony are satisfied when a person: (1) knowingly or intentionally; (2) confines another person without his or her consent; (3) while armed with a deadly weapon.[7] Ind. Code § 35-42-3-3. Although the crimes clearly have distinct elements, circumstances exist where the actual evidence used to convict a defendant of robbery may be the same as that used to convict the defendant of confinement. See Polk v. State, 783 N.E.2d 1253, 1259 (Ind. Ct. App. 2003), trans. denied. In these situations, double jeopardy proscribes multiple convictions. Id. However, multiple convictions do not violate double jeopardy when "the confinement was more extensive than that necessary to commit the robbery." Seide v. State, 784 N.E.2d 974,

[6] Robbery is also a Class B felony if it results in bodily injury to a person other than the defendant. Ind. Code § 35-42-5-1.

978 n.4 (Ind. Ct. App. 2003).

The charging information indicates that the State's theory for robbery was that Reynolds took property from Escalante and Willsey by using or threatening force against them. The State's theory for confinement was that Reynolds confined Johnson by making her lay on the ground.[8] Therefore, different evidence was used to convict Reynolds of the two counts, as different victims were involved in the robbery and confinement. In situations where the defendant harms or threatens harm to distinct victims, double jeopardy is not violated by multiple convictions. See Bald v. State, 766 N.E.2d 1170, 1172 n.4 (Ind. 2002) (double jeopardy is not violated where "convictions arise from a situation 'where separate victims are involved'" (quoting Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring))); Randall v. State, 455 N.E.2d 916, 931-32 (Ind. 1983) (holding that five convictions for confinement were proper where there were five victims; act "was a personal crime committed upon each of these persons").

Despite the fact that Reynolds's actions affected distinct victims, he argues that because his "request that the people in the bank 'get down' and that each person crouched was limited to the amount of 'force' needed to complete the robbery," double jeopardy bars multiple convictions. Appellant's Br. at 9. We agree that Reynolds could probably not be properly convicted of robbery and confinement with regard to Escalante and Willsey.

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[7] Criminal confinement may also be accomplished by removing a person by fraud or threat of force from one place to another, and is also considered a Class B felony if it results in serious bodily injury to another person or is committed on an aircraft. Ind. Code § 35-42-3-3 (a)(2), (b)(2).

[8] The State also charged Reynolds with criminal confinement for making Porter lay on the ground. The jury found Reynolds not guilty of this count.

However, as discussed above, Reynolds was convicted of robbery with regard to Escalante and Willsey, and of confinement with regard to Johnson. See Vanzandt v. State, 731 N.E.2d 450, 455-56 (Ind. Ct. App. 2000), trans. denied (where defendant confined two victims while robbing one, defendant could not be convicted of confinement of the robbery victim, as amount of force used was only that necessary to commit robbery, but conviction of confinement of other victim was proper). Said another way, the confinement of Johnson was not necessary with regard to the robbery of Escalante and Willsey.

We conclude that the trial court properly entered judgments of conviction for both robbery and criminal confinement.

III. Consecutive Sentences

Reynolds argues that the trial court improperly ordered that his sentences run consecutively because his fifteen-year sentences for robbery and criminal confinement exceed the advisory sentence for those crimes. See Ind. Code § 35-50-2-5 (advisory sentence for Class B felonies is 10 years). He argues that his sentence therefore violates Indiana Code section 35-50-2-1.3, which states:

> (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
> (c) In imposing:
> (1) consecutive sentences in accordance with Ind. Code 35-50-1-2;
> (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
> (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;
> a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

As support, Reynolds cites Robertson v. State, 860 N.E.2d 621, 624-25 (Ind. Ct. App. 2007), trans. granted, opinion vacated in relevant part, --- N.E.2d ---, 2007 WL 2258260 (Ind. Aug. 8, 2007), in which a different panel of this court held that this statute "is clear and unambiguous and imposes a separate and distinct limitation on a trial court's ability to deviate from the advisory sentence for any sentence running consecutively." As indicated, our supreme court has vacated the portion of the court of appeal's opinion dealing with Indiana Code section 35-50-2-1.3.[9] Our supreme court held that this statute does not require a trial court to impose the "advisory" sentence when sentencing a defendant to consecutive terms. Robertson v. State, --- N.E.2d ---, 2007 WL 2258260 at *5. In other words, Indiana Code section 35-50-2-1.3 "imposes no additional restrictions on the ability of trial courts to impose consecutive sentences." White v. State, 849 N.E.2d 735, 743 (Ind. Ct. App. 2006), trans. denied. We conclude that the trial court was legally permitted to order Reynolds's sentences to run consecutively.

Conclusion

We conclude that the trial court acted within its discretion in denying Reynolds's motion for a continuance, that Reynolds's convictions for robbery and criminal confinement do not violate double jeopardy, and that the trial court properly ordered Reynolds's sentences to run consecutively.

Affirmed.

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[9] Our supreme court granted transfer on April 17, 2007. Reynolds filed his brief on February 27, 2007, at which point Robertson was still good law.

VAIDIK, J., and BRADFORD, J., concur.